

UNITED STATES TAX COURT
WASHINGTON, DC 20217

ANTHONY M. KISSLING & SUZANNE R.)	
KISSLING,)	
)	
Petitioner(s),)	CZ
)	
v.)	Docket No. 19857-10.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	
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)	

ORDER

This case was on the Court's November 14, 2011 trial calendar for Buffalo, New York but is now set for trial at a special session in August. The Kisslings moved on May 19, 2015 to compel the production of documents -- specifically for the production of all nonparty subpoenas and all responses and documents produced by any nonparties who get such subpoenas. Their motion illuminates a startling divergence between our Court's Rules and those of the Article III courts.

Federal Rule of Civil Procedure (FRCP) 45(a)(4) and its predecessors have for close to a quarter century required notice to other parties before service of nonparty subpoenas for the production of documents, information, or tangible things. The Kisslings fortuitously learned that the Commissioner had served at least one such subpoena. They understandably wanted to know if there were others and what, if anything, the Commissioner got in response. The Commissioner argues that if there's no Tax Court rule that requires him to notify taxpayers about whom he is subpoenaing, he'd just as soon keep his pretrial preparation to himself.

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There is no Tax Court rule that expressly requires such notice. The first question is therefore whether there is a Tax Court rule that *implicitly* requires notice of subpoenas. The Kisslings think there is: Rule 21(a), which requires parties to serve each other with “all pleadings, motions, orders, decisions, notices, demands, briefs, appearances, or other similar documents or papers relating to a case.” We have to agree, however, with the Commissioner that this is a list of documents that consists of things that are *filed* with the Court or (in the case of demands for interrogatories or documents under Rules 71 and 72) that must be served on another party. We do not think that our Rules require notice of nonparty subpoenas.

We do have to disagree with the Commissioner, however, that this absence of a rule creates an implication that secret subpoenas are favored. We promulgated our Court’s Rule 147, which governs subpoena practice, back in 1973. *See* 60 T.C. 1137 (1973). At that time, we said that our goal was a rule substantially similar to FRCP 45. *Id.* Back then, FRCP 45 didn’t require notice for subpoenas. Fed. R. Civ. Proc. 45 (1970). The notice requirement was added in 1991 to give parties the same opportunity to challenge nonparty subpoenas for documents that they had to challenge subpoenas for depositions (since FRCP 30 and 31 already provided notice protection in these circumstances). *See* Fed. R. Civ. Proc. 45 advisory committee’s note (1991). We have never publicly stated that we intended to deviate from Article III practice -- it’s just an example of the two sets of rules drifting apart over time.

The Court will therefore not find that the Commissioner has violated our rules. But we also think that the current federal rule is a good one; and the Kisslings’ motion seeks undoubtedly discoverable information. Their case is, moreover, a conservation-easement case, a category that is currently quite productive of hard-fought litigation. Development of one case often affects others in the pipeline. The Court will therefore adopt the notification requirement of Federal Rule 45 as a modification to the pretrial order that governs this case.

It is therefore

ORDERED that the Kisslings’ May 19, 2015 motion to compel the production of documents is granted, and the Commissioner shall, on or before July 22, 2015, serve on counsel for the Kisslings all nonparty subpoenas that he has issued in this case, together with all responses and documents that nonparties produced after receiving those subpoenas. It is also

ORDERED that the pretrial order issued on April 28, 2015 is amended to include a requirement that both parties comply with Federal Rule of Civil Procedure 45(a)(4). In the interest of symmetry, it is also

ORDERED that the Kisslings shall, on or before July 22, 2015, serve on counsel for the Commissioner any nonparty subpoenas that they have issued in this case before the date of this order, together with all responses and documents that nonparties produced after receiving those subpoenas.

This division of the Court has notified the Court's Rules Committee of this opportunity for a possible amendment to our Rules.

(Signed) Mark V. Holmes
Judge

Dated: Washington, D.C.
July 15, 2015